**Makro, Inc. and Renaissance Properties Co., d/b/a Loehmann's Plaza *and* United Food and Commercial Workers Union Local No. 880, AFL–CIO–CLC.** Case 8–CA–21058

November 21, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision in this case[1] present the questions of whether the Respondents have violated Section 8(a)(1) of the Act by (1) restricting the Union's access to their property by making oral demands that the Union move its pickets and handbillers; and (2) filing and pursuing a lawsuit seeking injunctive relief in state court as to the number and location of the pickets and handbillers.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

## I. THE ACCESS ISSUE

The judge found that the Respondents did not violate Section 8(a)(1) by restricting the Union's access to their property. We find merit in the General Counsel's exceptions.

### A. *Facts*

The Respondent, Makro, Inc. (Makro), operates a retail store, selling both grocery and nongrocery items, in Willoughby Hills, Ohio. The Respondent, Renaissance Properties Co., d/b/a Loehmann's Plaza (Renaissance), owns the strip shopping mall, Loehmann's Plaza Shopping Center (Loehmann's Plaza), where the Makro store is located. Makro leases the property its store occupies from Renaissance.

The Makro store is situated in the northeast corner of Loehmann's Plaza and faces the shopping center's primary parking area[2] A vehicle driveway runs parallel to the storefront and separates the Makro property from the primary parking area[3] This driveway is used by cars entering and leaving the parking lot and by customers who pick up purchases at the Makro store.

The storefront has one customer entrance vestibule and two customer exit vestibules, one on each side of the entrance vestibule. The vestibules are glass-enclosed extensions of the building which measure about 40 feet in width and 15 feet in depth. Each vestibule has a pair of doors about 15 to 20 feet in width on two sides. Therefore, there are two customer entrances and four customer exits, each with double doors. The store frontage is approximately 500 feet.

Islands, measuring 14 feet by 40 feet, planted with shrubbery stand between each vestibule and the vehicle driveway. These islands and the vestibules create two areas between the exit vestibules on either side of the store's front and the entrance vestibule in the center of the store's front[4] These areas are approximately 100 feet wide and 29 feet deep. Shopping carts are stored in the center of these areas next to the building. The carts are lined up about 15 feet outward from the wall of the storefront, approximately 24 feet from the entrance and exit doors on either side, and about 14 feet from the driveway in front of the store.

This leaves an unoccupied blocked U-shaped area of approximately 2200 square feet between the entrance vestibule and the exit vestibules on either side of the store's entrance. The 15-foot deep part of this open area, in front of the carts and abutting the driveway, is used by customers to pull their cars up for loading their merchandise. There is no raised or curbed sidewalk in front of the Makro store.

Makro is the largest store in Loehmann's Plaza. The 19 other smaller establishments occupy the space to the west of Makro and are situated in an L-shape. On the south side of the plaza, which is bounded by Chardon Road (Route 6), there are other establishments that are not part of Loehmann's Plaza. These include Burger King and Friendly. A large parking lot, composed of primary and secondary parking areas, faces the 20 Loehmann's Plaza stores. As mentioned above, the primary (but smaller) parking area faces Makro. The larger secondary parking area faces the other 19 stores (and the driveway in front of Makro leads into it). An access driveway runs along the east side of the primary parking area and connects Chardon Road with the driveway in front of Makro.

There are three entrances to Loehmann's Plaza from Chardon Road, the south border of the shopping center. The closest is approximately one-fourth mile from Makro and directly south of Makro's eastern side. (Burger King and Friendly are reached through this entrance.) This entrance and the most western entrance both have traffic lights. A center entrance to the shopping center does not. The speed limit on Chardon Road is 35 miles per hour.

[1] On October 26, 1989, Administrative Law Judge Lowell Goerlich issued the attached decision. The General Counsel filed exceptions and a brief in support of the exceptions, and the Respondents filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] A description of the layout of the shopping center is explained in brief below and more fully in the judge's decision.

[3] Between the driveway and the primary parking lot are seven traffic islands.

[4] The areas between the vestibules are covered by the store's overhang.

Parallel to the access road connecting Chardon Road to the driveway in front of Makro is the north-south running Bishop Road (State Route 84). This road has a speed limit of 35 miles per hour. There is an entrance off Bishop Road, directly east of Makro, from which a driveway leads to Makro and Loehmann's Plaza. The entrance is about 530 feet from Makro. Two stores, Reni and Hills (formerly Golden Circle), are located on the driveway between the Bishop Road entrance and Makro.

On May 4, 1988, Makro opened its store at its Loehmann's Plaza location. That same day, at 7 a.m., the Union placed 12 pickets at the store: 2 at each of the 2 entrances and 2 at each of the 4 exits. The pickets walked about 7 or 8 feet from the entrance and exit doors. The pickets stationed between the entrance and exit vestibules[5] walked in a path parallel to the door (in the 24-by 29-foot area parallel to the vestibule and the island in front of the vestibule) but which then turned in a L-shape direction leading in front of carts parked in front of the store[6] The pickets carried signs that read: ''UFCW Local 88. . . . Holding the line. . . . Don't shop . . . . [Ghostbuster symbol across 'Makro'] . . . . Non-union . . . . For the American standard of living.'' The pickets at the exits also passed out leaflets explaining in more detail the Union's position that wages and benefits provided under the Union's contracts might be jeopardized by Makro, whose employees were not covered by union contracts.

Makro's general manager Fike and Attorney Lardakis told the union representatives to move the pickets ''from the premises'' because it was private property. The Union refused to move, except briefly while a ribbon-cutting ceremony was held.

On May 25, 1988, Renaissance's general partner, Robert Stark, and Makro's two above-named officials again asked the Union to leave their private property[7] Stark told the pickets to go to two of the entrances off of Chardon Road[8] The Makro officials told the Union to place its pickets at the two entrances closest to Makro. The Union again refused. The Respondents filed for injunctive relief in state court on June 6, 1988.

The Union continued the picketing until restrained by a temporary order of the Court of Common Pleas, Lake County, Ohio, on June 29, 1988. This order limited the Union to four pickets no closer than 25 feet from Makro's entrance doors. However, this would have placed the pickets in the middle of the driveway in front of Makro. Therefore, the injunction effectively placed the pickets 50 feet from the store on the traffic islands dividing the primary parking lot from the driveway in front of Makro.

The Respondents maintained their legal position that the pickets should be located at the shopping center's entrances closest to Makro, and on September 16, 1988, the court entered a permanent injunction[9] The injunction restrained the Union:

> . . . from placing more than four (4) pickets on picket duty in front of the plaintiff store and no more than two (2) at the entrance to the parking lot at Route 6 . . . [and] that the pickets shall station themselves in the parking lots south of the front of the store, and may not approach closer to the front of the building than twenty-five (25) feet.

Pursuant to the injunction, the Union placed its pickets on the traffic islands in front of Makro. The Union most commonly used the unpaved traffic island directly in front of the entrance of the store, although it would occasionally use the other islands.

In addition, the Union attempted to picket at all the entrances on Chardon Road.[10] Thus, it placed pickets at the east entrance of Chardon Road, on the Burger King side of the driveway entrance. However, when the Burger King manager complained, the Union moved its pickets across the driveway. At that location, there were signs advertising Reni and Golden Circle, two other stores in the vicinity. Reni's manager then advised the Union that his customers were complaining about the signs and asked which Reni was being pick-

[5] No evidence was adduced as to the paths of the pickets stationed at the exits on the east and west ends of the store's front. Depending on the availability of pickets, the Union placed one or two pickets at each of these exists. Makro's employment manager Michelle Broda testified that the area between the exit on the west side of the store's front and the next store, Gentry, is open. She stated this area is approximately 30 feet wide, and that the area between the exit on the east side of the store's front and the adjoining outdoor sales area is 15 to 20 feet wide. Both of these areas share the 29-foot depth of the areas between the vestibules.

[6] The testimony was not consistent as to how far along the length of the carts the pickets walked. According to union organizer Patricia Baizel's description, the pickets walked about one-fourth the length of the carts (about 12 feet) and then turned backed. According to Michelle Broda, Makro's employment manager, the pickets walked between one-half and the full length of the carts, about 25 to 50 feet, before turning back.

[7] Makro had a posted no-solicitation rule. The only exception to this rule had been during the first 5 days of the store's operations when employees of the other Loehmann's Plaza stores (i.e., other lessees of Renaissance) had been allowed to pass out leaflets both inside and outside Makro's vestibules.

There is no evidence that Renaissance has a no-solicitation rule in the parking lots or other areas of its property. Unrebutted evidence was presented that other persons had passed out leaflets and solicited for charity in the primary parking lot.

[8] These were the middle and western entrances to the shopping center off of Chardon Road, approximately three-tenths and four-tenths miles from Makro.

[9] On December 26, 1989, the Ohio Court of Appeals affirmed the judgment of the trial court.

[10] When the Union had extra pickets, it had also placed pickets at the eastern entrance prior to the injunction.

eted (as the local Reni was organized by the Union). The Union stopped picketing there.

According to the unrebutted testimony of the Union's organizer, Patricia Baizel, the picketing at these locations was not effective. As she explained, ''[y]ou cannot read the wording on the sign approaching either of those exits on that driveway or from State Route 6 (Chardon Road). You cannot read them and clearly understand unless you are practically on top. So the only people that are able to read them would then be the people that are stopped for the light.''

The Union also attempted to picket and pass out handbills from the center entrance to the shopping center off of Chardon Road.[11] According to Baizel, in a 1-week effort at handbilling ''no one . . . took a handbill.''[12] Baizel further explained that handbilling was difficult here because of the speed of the automobiles, the fact that the windows of the automobiles were closed, and the pickets were on the opposite side from the driver. As noted above, there is no traffic light at this entrance, and, as Baizel testified without contradiction, Chardon is a ''very busy road.'' As for the most western entrance to the shopping center off of Chardon Road, Baizel described it as the ''least entered.''

### B. *Analysis*

In *Jean Country*,[13] we reexamined and clarified our analytical approach in access cases. We noted there that in all access cases, our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. Consideration of the availability of reasonably effective alternative means is especially significant in this balancing process. But in the final analysis, there is no simple formula that will determine the result in every case.[14]

However, *Jean Country* provided more specific guidance to the extent of listing those factors which are relevant to each of these above-mentioned assessments. Those factors relevant to assessing the strength of the property right include: the use to which the property is put; the restrictions, if any, that are imposed on public access to the property; and the property's relative size and openness. The factors that may be relevant to the consideration of a Section 7 right include: the nature of the right; the identity of the employer to which the right is directly related (e.g., the employer with whom a union has a primary dispute); the relationship of the employer or other target to the property to which access is sought; the identity of the audience to which the communications concerning the Section 7 right are directed; and the manner in which the activity related to that right is carried out. Finally, factors that may be relevant to the assessment of alternative means include: the desirability of avoiding the enmeshment of neutrals in labor disputes; the safety of attempting communications at alternative public sites; the burden and expense of nontrespassory communication alternatives; and the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message.[15]

The judge found the facts in this case very similar to those in *Tecumseh Foodland*, 294 NLRB 486 (1989), where the Board had applied the above-described *Jean Country* standards and dismissed a similar allegation.[16] Similar to the facts in *Tecumseh*, the judge found that Makro did not share its building with another tenant, its pickup areas were under its exclusive control and used only by its customers, and solicitations were banned. Further, as in *Tecumseh*, the audience the Union sought could not reasonably be reached by direct personal contact, telephone, or mail and the detailed nature of the Union's message could not be fully contained on a picket sign.

Based on these factors, the judge reached the same conclusion as in *Tecumseh*, i.e., ''a proper balancing of the parties' rights here would permit the Union to distribute its handbills in some manner and at some place on the Respondent's property.'' The judge found that the manner in which the Union sought to exercise its Section 7 right by congregating 12 pickets in a ''limited area'' near the entrance and exits of the store, where store carts were parked and customers picked up purchased items, impermissibly impaired Makro's property rights. The judge concluded that one picket at each entrance and exit would have been sufficient to publicize the Union's message and would have caused no congestion or impairment of the Respondent's property rights. Accordingly, he dismissed the complaint.

In his exceptions, the General Counsel argues that *Tecumseh* is distinguishable from the facts at hand. In support of this argument, the General Counsel compares the 500-foot store frontage with six separate entrances and exits here (and each with a 15-to-20 foot

[11] This was the only Chardon Road entrance at which the Union tried to handbill.

[12] In a later attempt to handbill in preparation for the state court hearing, one person took a handbill.

[13] 291 NLRB 11 (1988).

[14] Id. at 14.

[15] Id. at 13.

[16] In that case, four or five pickets had stood on the sides of an 11-foot opening from the covered sidewalk fronting the store into the 11-by-21 foot entrance area in which the store's doors were located. Soft drink and newspaper vending machines were also situated in the entrance area. The Board majority (Member Cracraft dissenting) found that the manner in which the union exercised its Sec. 7 right impermissibly interfered with the employer's private property right to have its store entrance be free and uncongested. The Board further found that the union could have effectively communicated its message in a less physically obtrusive way, such as by using only one or two pickets. The Board, therefore, dismissed the allegation that the employer violated Sec. 8(a)(1) by ordering the pickets to leave.

door facing an area of at least 24 by 29 feet in which each pair of pickets walked) to the 11-by-21 foot area in *Tecumseh*. At each of these doors, the Union had placed two pickets as compared with the five pickets in the smaller area in *Tecumseh*. In addition, the General Counsel cites the fact that in the 2 months of picketing and handbilling prior to the state court injunction there were only 2 complaints made to Makro about the picketing, with over 70,000 leaflets handed out.[17] On the other hand, in *Tecumseh*, there had been 2 complaints in the first 5 minutes that picketing had been allowed. The General Counsel points out that in *Tecumseh*, the Board stated the union could have placed fewer pickets, i.e., 1 or 2 pickets, and thereby been allowed to remain at that location. As the General Counsel asserts, this is exactly what the Union did here. It placed 2 pickets at each entrance and exit, the areas adjoining which were larger than the area in *Tecumseh*. The General Counsel further argues that applying the standards set forth in *Jean Country*, supra, the Respondents violated Section 8(a)(1) by directing the Union to move its pickets from the entrances and exits to Makro.

We agree with the judge, as discussed below, that there are some similarities between the instant facts and those in *Tecumseh*. However, our full assessment of the Jean Country factors shows that *Tecumseh* is distinguishable.

First, regarding the factors relevant to assessing the weight of the Respondents' property rights, we note that Renaissance owns, and Makro leases, the property that the store occupies.[18] Makro also has a nonexclusive easement to use the common area (the parking lots) of Loehmann's Plaza and for its customers to do so. Makro shares this easement with the other lessees in Loehmann's Plaza. Makro has no other property rights in Loehmann's Plaza, which is owned by Renaissance.

As to the property near the entrances and exits, these areas are generally open to Makro's customers, who are members of the general public.[19] As discussed above, Makro did have a no-solicitation rule pertaining to its property. The only occasion when this rule was not applied was during the first 5 days of Makro's operation, when, as described above, representatives from other lessees of Renaissance were allowed to leaflet both inside and outside the store's vestibules.

As further relevant to the property interest, we note the 500-foot frontage of the store, which includes two entrances and four exits. The area between each entrance and one of the exits is approximately 100 by 29 feet, although approximately 50 by 15 feet of this area, closest to the store, is occupied by shopping carts. Further, the part of this area adjoining the driveway in front of Makro, which measures approximately 100 feet by 14 feet deep, is used by customers to back up their cars for loading merchandise. No evidence was presented that the picketing ever interfered with this activity.

As for the shopping center in general, it is open to the general public and shoppers could park in either the primary or secondary lots regardless of which store they were patronizing. There is no evidence that solicitations were banned in parts of the shopping center other than at the Makro store. On the other hand, unrebutted testimony showed that other persons passed out leaflets in the primary parking lot.

We find that Renaissance's interest in the property it owns and Makro's interest in the property it leases are not insubstantial.[20] Makro, although part of a shopping center, does not share its building with other tenants, bans solicitations, and maintains exclusive control of the pickup areas,[21] which are used only by its customers. In the area immediately outside of Makro's entrances and exits, Makro maintains a generally enforced no-solicitation rule.[22]

Next, examining the nature of the Union's conduct, we note that the language on the Union's picket signs and leaflets communicated an area standards objective. Although nonemployee area standards picketing and handbilling has lesser significance in the scheme of Section 7 than direct organizational solicitation or the protestation of unfair labor practices, it is clearly protected.[23]

Further, after balancing this right against the above-described right, in light of the degrees to which the grant or denial of access would impair either right, we agree with the judge that the Union should be permitted to distribute its handbills somewhere on the Respondents' property. It is at this point, however, that we part company with the judge's analysis. He continued to find *Tecumseh* applicable and, as in that case, found the manner and location of the Union's picketing had impermissibly impaired the Respondents' property rights.

The decision in *Tecumseh* is very much controlled by the number of pickets in proportion to the size of the employer's open area. The situation at the Makro store is not comparable. The General Counsel has cor-

[17] No evidence was presented as to the contents of the complaints.

[18] This apparently includes the outside area immediately adjoining Makro's entrances and exits, where the Union initially chose to picket.

[19] Although membership in Makro is necessary to shop at that store, apparently the requirements for membership are slight. According to undisputed testimony of union organizer Baizel, when she telephoned Makro to ask how to become a member, she was told she must show a driver's license and a checkstub, but that showing a driver's license would be sufficient.

[20] See *Red Food Stores*, 296 NLRB 450 (1989).

[21] Makro apparently shares this control with lessor Renaissance.

[22] See *Target Stores*, 292 NLRB 933, 934–935 (1989).

[23] E.g., *Jean Country*, supra.

rectly stated that each of the areas in which the pairs of pickets walked is larger than the area in which the Board stated in *Tecumseh* the union would have been permitted to place two pickets.[24] In the absence of any evidence that the pickets interfered with the ingress or egress of customers, we find that the number and locations of the pickets do not, standing alone, establish a reasonable likelihood that customers would have difficulty gaining access to the store.[25]

Instead, considering the size of Makro's store and the areas near its entrances and exits, we find that the number of pickets was reasonable. As noted above, in 2 months of picketing during which time 70,000 leaflets were handed out, Makro received only 2 complaints,[26] and the evidence does not show if they related to any disturbance caused by the picketing. The evidence indicates that the pickets were peaceful and unobstructive, and there is no evidence that the distribution of handbills at the store entrances and exits any more inhibited the flow of traffic to and from the stores than did the pickets, i.e., there was no littering or other obstructive impairment of the Respondent's property rights. The pickets at the storefront entrances and exits were also in such proximity to Makro's customers that the Union could not have more carefully restricted its activities to reach the intended audience while not disturbing others.[27] In these circumstances, the Union's area standards picketing, although not at the strong end of the spectrum of Section 7 rights, was certainly worthy of accommodation against substantial impairment.

Turning to the question of the Union's alternative means of communicating its message, we agree with the judge that the audience the Union sought could not reasonably be reached by direct personal contact, telephone, or mail. The Union's message here, which was primarily intended to benefit union members employed elsewhere, was directed at a diverse population consisting of Makro's customers, which was not readily identifiable. Also as the judge found, it would not be reasonable to insist that the Union undertake the burden and expense of a public media campaign when there was no likelihood that such a campaign would even reach its intended audience. Further, we agree with the judge's finding that the information could not be fully contained on a picket sign.[28] This is confirmed by comparison of the brief message on the picket signs with the full page letter message in the union leaflet in which the Union sought to give potential customers more complete information regarding its dispute with Makro.

Further, we find that picketing or handbilling near the entrances off of Chardon Road was generally ineffective, possibly dangerous, and enmeshed neutral employers. Leafleting was not effective to persons in the passing cars and, according to the unrebutted testimony of union organizer Baizel, the picket signs were also unreadable from the passing cars. In view of evidence that the automobiles were entering from Chardon Road, which has a speed limit of 35 miles per hour, the safety of those picketing locations may also be questioned.[29]

In addition, when the Union picketed at two locations near the eastern entrance off of Chardon Road, it encountered complaints by neutral employers. This same problem could reasonably be expected from the Union's picketing at the other two entrances off of Chardon Road, which were even further away from Makro, and close to other stores.

For the above reasons, the entrances to the shopping center off of Chardon Road, to which the Respondents directed the Union to move its pickets, were not reasonable alternatives to the Union's choice of picketing near Makro's entrances and exits.

The Union did not attempt to picket from the entrance to the shopping center off of Bishop Road, Route 84. This latter entrance might possibly be one of the entrances that Makro had in mind, when its officials, on May 25, directed the Union to move its pickets to the two entrances closest to Makro.[30] However, there is no record evidence which would would warrant distinguishing that entrance to the shopping center from those off of Chardon Road, as far as safety, effectiveness of picketing, or enmeshment of neutrals is concerned. Cars were entering the shopping center from this entrance also from a road with a speed limit of 35 miles per hour, and other stores were nearby which passengers who saw the signs might believe were the objects of the picketing.

We conclude that none of the entrances to the shopping center afforded a reasonable alternative for the Union to transmit its message by picketing and leafleting.[31] Accommodating the private property and

[24] Three of the four areas are three times as large as the 11-by-21 foot area in *Tecumseh*. The fourth area, that adjoining the most eastern exit, as described in fn. 4 above, is 15 to 20 feet by 29 feet.

[25] Cf. *Tecumseh*, supra at 488, fn. 7.

[26] As noted above, this contrasts with the two complaints made in Tecumseh in the 5 minutes of picketing.

[27] As described above, this was not the case when the Union tried to picket at other locations in the shopping center. Thus, when it picketed near Burger King and a sign advertising Reni, managers from both stores complained, in part, about the confusing impression of what store was being picketed.

[28] In their brief, the Respondents did not contest the judge's findings on this point.

[29] See *W. S. Butterfield Theatres*, 292 NLRB 30 (1988).

[30] This was the same request the Respondents made in their injunctive action, without clarifying what two entrances they meant.

[31] During the hearing, and again in its exceptions, the Respondents contended that the Union's picketing and leafleting from the traffic islands in front of Makro to which it was moved by the state court injunction provided a reasonable alternative to its original picketing

*Continued*

Section 7 rights pursuant to our analysis in Jean Country, we find that the impairment to the Respondents' property interests if access were granted to the Union would not be substantial, in light of the unobtrusive manner in which the Union carried out its picketing. By contrast, in the absence of a reasonable alternative means of communication, the Union's Section 7 right would be ''severely impaired–-substantially 'destroyed' within the meaning of Babcock & Wilcox''[32] without entry onto the property adjoining Makro's entrances and exits. We find that the Section 7 right outweighed the Respondents' right to restrict access to their private property in this particular context, and the Union was entitled to engage in picketing and handbilling that it conducted at the entrances and exits of Makro's store.

Accordingly, we conclude that Makro's directions on May 4 and 25, 1988, and Renaissance's directions on May 25, 1988, for the Union to move its pickets violated Section 8(a)(1) of the Act.

## II. THE LAWSUIT ISSUES

The complaint further alleges that the Respondents violated Section 8(a)(1) by seeking injunctive relief, as described above, in the Court of Common Pleas, Lake County, Ohio, as to the number and location of pickets and handbillers.[33] Because the judge found that the Respondents' statements to the Union to move its pickets did not violate Section 8(a)(1), he did not specifically discuss the second allegation. Instead, he recommended that the complaint be dismissed in its entirety.

In his exceptions, the General Counsel argues that the Union had a right to picket and handbill at the entrance to the Makro store and that, therefore, the Respondents violated Section 8(a)(1) by seeking injunctive relief against the Union. The General Counsel asserts that under the preemption doctrine set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), a state court suit attacking as trespassory peaceful union picketing and handbilling on private property is preempted if the Board has the same issue before it.

The General Counsel argues that preempted cases are excluded from the general principles of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). This argument refers to footnote 5 of that decision in which the Court stated that it was not dealing with lawsuits claimed to be beyond a state court's jurisdiction because of Federal preemption or a suit that has an objective that is illegal under Federal law. The General Counsel cites the risk that conflicting remedies will result if preemption is not found. He points to the fact that this is exactly what has happened in the instant case: the state court has allowed the pickets no closer than 25 feet to the store entrances, although the judge in his decision stated that one picket at each exit and entrance would have been sufficient to have publicized the Union's message and caused no impairment of the Respondents' property rights. The General Counsel claims a dilemma might result if the Union heeded the judge's directions (should it be adopted by the Board) and thereby apparently placed itself at risk of contempt proceedings before the state court. The General Counsel further argues that because the lawsuit on its face is aimed at the exercise by the Union of its protected right to handbill and picket, it is a violation of Section 8(a)(1).

In their answering brief, the Respondents argue that *Giant Food Stores*, 295 NLRB (1989),[34] has resolved the issue of whether a state court trespass action violates Section 8(a)(1) if maintained after the picketing union files an unfair labor practice charge. They assert that, according to Bill Johnson's, supra, when an employer is successful, as the Respondents were here, in obtaining an injunction, the lawsuit cannot be found to lack a reasonable basis and is, therefore, lawful even in the event that it is filed for a retaliatory motive.

The Respondents further assert that any dilemma posed by the contrasting restrictions imposed by the state court and the judge were a result of the Union's

location. However, on May 4, Makro officials told the Union to move its pickets ''from the premises'' because it was private property. On May 25, these officials told the Union to place its pickets at the two entrances closet to Makro, and Renaissance's general partner told the Union to move the pickets to two of the entrances off of Chardon Road. In view of these facts, we find the Respondents were directing the pickets off all their property except two entrances at the perimeter of the shopping center. Further, in their injunctive action, the Respondents continued to assert their position that they did not want the pickets any closer than the entrances to the shopping center.

Prior to the state court's temporary restraining order on June 29, 1988, there was no reasons for the Union to believe that the Respondents would have permitted picketing at any location closer than the perimeter of the shopping center. Therefore, the traffic islands in front of Makro cannot properly be considered as a reasonable alternative at the pertinent time of the alleged unfair labor practice when the Respondents directed the Union to move its pickets. See *Little & Co.*, 296 NLRB 691 (1989); *W. S. Butterfield Theatres*, supra at fn. 9; and *Jean Country*, supra at fn. 18.

Further, that the Respondents permitted the picketing at this location after the state court injunction was issued indicates only that they too were bound by the injunctive action. It does not provide a basis for exonerating the Respondents from directing the Union not to picket any closer than the entrances to the shopping center nor was it an alternative offered by the Respondents. We, therefore, consider it unnecessary to decide whether picketing on the traffic islands in front of Makro was a reasonable alternative.

[32] *Jean Country*, supra at 19, citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

[33] The Respondents filed for injunctive relief on June 6, 1988; the instant charge was filed June 21, 1988; and the complaint issued March 30, 1989.

[34] However, in that case, unlike this one, no party timely raised the issue of whether Bill Johnson's is inapplicable because of preemption. See the Board's subsequent Order reported at 298 NLRB 410 (1990) (Chairman Stephens dissenting), denying the General Counsel's and the Charging Party's motions for reconsideration. Accordingly, *Giant Food* is of limited relevance here.

acting in a manner beyond the protection of its Section 7 rights. They, therefore, argue that the Board processes should not now be invoked to protect the Union from the consequences of its own unprotected activity.

A. *Are State Court Lawsuits Seeking to Enjoin Peaceful Union Picketing or Handbilling on Private Property Preempted by Federal Law and, if so, when does Preemption Occur?*

In *Bill Johnson's*, the Supreme Court considered whether the Board could enjoin the prosecution of a state court civil suit. The Court concluded that for a lawsuit to be an enjoinable unfair labor practice it must both lack a reasonable basis and have been filed with the intent of retaliating against an employee for the exercise of Section 7 rights. However, in reaching its determination in *Bill Johnson's*, the Court at footnote 5, stated that it was not addressing the legality of all lawsuits:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. . . . Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act
> . . . and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction ''where [the Board's] federal power pre-empts the field.'' *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).[35] [Emphasis added].

We, therefore, must address whether, and also when, state court lawsuits seeking to enjoin peaceful union picketing or leafleting are preempted by Federal law.

In *Garmon*, supra, the Court set forth two general guidelines for determining the scope of NLRA preemption. First, the States must yield to the Board's primary jurisdiction over conduct clearly protected or prohibited by Sections 7 or 8 of the Act.[36] The Court's second guideline concerns us here:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.[37] [Emphasis added].

In *Sears, Roebuck & Co. v. Carpenters*,[38] however, the Court carved out an exception to the second Garmon guideline. There, the Court found that a state court trespass action seeking to enjoin peaceful union picketing on the employer's property was not preempted. The basis for the Court's holding was that no risk of overlapping jurisdiction existed concerning the arguably protected activity at issue because the union never filed an unfair labor practice charge, and, therefore, the employer could not directly obtain a Board ruling on whether the trespass was protected.[39] The Court further explained that if the union did file an unfair labor practice charge, ''the protection question would then be decided by the agency experienced in accommodating the § 7 rights of unions and the property rights of employers in the context of a labor dispute.''[40] In sum, by this decision, the Court announced that (1) where arguably protected activity is involved, preemption does not occur in the absence of Board involvement in the matter, and (2) upon the Board's involvement, a lawsuit directed at arguably protected activity is preempted by Federal labor law.[41] It is clear that under *Sears* preemption does not occur before an unfair labor practice charge is filed, at least so long as the landowner has communicated to the trespassers a demand that they leave before filing the trespass suit.[42] It is also clear under *Sears* that when the Board issues a decision finding the conduct protected, the Board's decision and remedy preempts any state court action.[43]

The Court majority in *Sears* did not more specifically state when preemption would occur. In a concurrence, Justice Blackmun asserted the view that preemption operates when an unfair labor practice charge has been filed. In a separate concurrence, Justice Powell

[35] *Bill Johnson's*, supra at 737–738.

[36] *Garmon*, supra at 244.

[37] Id. at 245.

[38] 436 U.S. 180 (1978).

[39] Id. at 202. Although that opinion also addressed arguably prohibited activity, because here only arguably protected activity is present, we limit our discussion to the latter.

[40] Id. at 207.

[41] See also *Clyde Taylor Co.*, 127 NLRB 103, 109 fn. 11, 110 (1960), in which the Board unanimously left undisturbed the trial examiner's finding that the subject matter of the state court lawsuit seeking an injunction against peaceful picketing was preempted by the Act, and, therefore, the state court had no jurisdiction to enjoin the picketing.

[42] *Sears*, supra at 207 fn. 44.

[43] See *Sears*, supra at 206–207 fn. 43, which holds that, when invoked, the jurisdiction of the Board over arguably protected activity is superior to that of the state courts. See also *Garmon*, supra at 245, ''If the Board decides, subject to appropriate federal judicial review, that the conduct is protected by § 7 . . . the States are ousted of all jurisdiction.'' See also *Brown v. Hotel & Restaurant Employees Local 54*, 468 U.S. 491, 500–503 (1984) (preemption of actually protected, as contrasted with arguably protected, activity applies by ''direct operation of the Supremacy Clause'' ''not as a matter of protecting primary jurisdiction, but as a matter of substantive right'').

dated preemption at the time the General Counsel issues a complaint. The three dissenting justices, Justices Brennan, Stewart, and Marshall, found preemption even in the absence of a charge. In sum, reading the majority opinion with Justice Powell's concurrence, *Sears* seems to indicate that the state suit is preempted at least by the time the General Counsel has acted to place the issue before the Board by issuing a complaint.[44]

In *Longshoremen ILA v. Davis*,[45] issued subsequent to *Bill Johnson's*, the Court provided guidance as to the point between the charge and the Board decision when preemption should occur. In that case, the Court ruled that a party asserting NLRA preemption must do more than merely assert that the activity involved is arguably protected or prohibited by the Act. As the Court stated:

> If the word ''arguably'' is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, the party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been ''authoritatively rejected'' by the courts or the Board. *Marine Engineers v. Interlake S.S. Co.*, 370 U.S. 173, 184 (1962). The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.[46]

We find that this test is not met merely by the filing of a charge. That action does not require any presentation of evidence. Neither does it involve any determination by a government official on the merits of an allegation. On the other hand, before the General Counsel issues a complaint, he conducts an investigation in order ''to ascertain, analyze, and apply the relevant facts.''[47] Only if ''the charge appears to have merit'' will a complaint issue.[48] That event ''marks the substitution of a formal allegation of law violation in the name of the United States Government for a charge by a 'person.'''[49] Stated differently, when the General Counsel issues a complaint, he has made a determination, pursuant to his ''final authority'' under Section 3(d) of the Act, that sufficient evidence has been presented to demonstrate a prima facie case. With regard to the lawsuits of the kind in issue here, the General Counsel's decision to issue a complaint signifies that a showing has been made that the union picketing or handbilling is arguably protected by the Act, the substantive requirement for preemption under Sears and the procedural requirement for preemption under *Davis*, because an unfair labor practice is committed only by interference with activity the Act protects. Accordingly, we find that when the General Counsel issued a complaint alleging that the Respondents' lawsuit constituted unlawful interference with protected activity, the requirements for establishing preemption were met.

### B. *The Respondents' Precomplaint Pursuit of the State Court Lawsuit*

From the above discussion it follows that prior to the issuance of the complaint, the Respondents' lawsuit was not preempted. (The Respondents had asked the pickets and handbillers to leave before filing the suit.) Therefore, the legality of the suit during that time period must be evaluated under the standards set forth in *Bill Johnson's*.

No evidence has been presented that the Respondents' purpose in pursuing their lawsuit prior to the time that the General Counsel issued his complaint was other than to protect or, at least have adjudicated, their property rights. Thus, there is no showing of any retaliatory or other unlawful purpose. We, therefore, find that the Respondent's precomplaint pursuit of their state court lawsuit was lawful. We, accordingly, dismiss the complaint to the extent it claims this conduct violated Section 8(a)(1).

### C. *The Respondents' Postcomplaint Pursuit of the Preempted State Court Lawsuit*

A different analysis is warranted with respect to the Respondent's postcomplaint pursuit of the state court lawsuit. The Respondents' prosecution of the suit during that time period need not be evaluated under Bill Johnson's because the suit was preempted and thus fell within the footnote 5 exception to the Court's decision. For the reasons stated below, we find that there is a sound basis for applying a different rule to a preempted lawsuit alleged to violate Section 8(a)(1) of the Act.

As this case illustrates, prior to preemption of state court jurisdiction under *Garmon* over conduct arguably subject to the Act, a respondent pursuing its state court action seeking to enjoin trespassory union picketing has a right to protect, or at least have adjudicated, its property rights.[50] However, once the General Counsel

[44] See *Sears*, supra at 206–207 fn. 43, which explains that state jurisdiction over arguably protected activity is ousted when the Board's jurisdiction is invoked. See also *Garmon*, supra at 245.

[45] 476 U.S. 380 (1986).

[46] Id. at 395.

[47] NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings, Sec. 10050.

[48] Sec. 101.8 of the Board's Statements of Procedure.

[49] NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings, Sec. 10260.

[50] Although a state court lacks authority to determine whether conduct constitutes an unfair labor practice, it would not, of course, be barred from taking federally protected interests into consideration in determining whether to enjoin a trespass by peaceful pickets or handbillers before the General Counsel decides whether to issue

decides to initiate a formal adjudicatory proceeding, the Board's jurisdiction is invoked and it becomes the exclusive forum for an adjudication of a respondent's property rights.[51] Because at that point the state court tribunal ''has no power to adjudicate the [preempted] subject matter,''[52] any attempt to continue the litigation necessarily amounts to pure harassment, i.e., an effort to subject the defendant or defendants in the lawsuit to litigation costs and burdens before a tribunal that indisputably lacks jurisdiction over the matter at that time.

As stated above, at the point of preemption, the special requirements of *Bill Johnson's* do not apply. Rather the ''normal'' requirements of established law apply. Under settled principles, a violation of Section 8(a)(1) is established if it is shown that the employer's conduct has a tendency to interfere with a Section 7 right.[53] Accordingly, if the Board in the unfair labor practice proceeding finds that picketing or handbilling on the property in question is protected by Section 7, and if a preempted state court lawsuit is aimed at enjoining that Section 7 activity, it is clear that the lawsuit tends to interfere (indeed, it is designed to stop) the exercise of a Section 7 right. Accordingly, the lawsuit is unlawful under Section 8(a)(1).[54]

As an employer's unlawful exclusion of employees or union representatives from its property violated Section 8(a)(1) without regard to the employer's motive in excluding them, there is no reason for requiring a showing of retaliatory motive when the employer pursues a preempted trespass suit seeking the same end. Accordingly, in cases concerning the lawfulness of preempted state court trespass lawsuits, we shall not require that retaliatory motive be shown as an element of an 8(a)(1) violation.

We emphasize that our decision does not foreclose a respondent from obtaining a ruling on the question of whether the union has a Federal right to remain on its property. That issue will be litigated in the formal Board proceeding that follows the General Counsel's issuance of his complaint. We also emphasize that this policy is in no way intended to frustrate a State's proper concern for maintaining domestic peace. A complaint alleging that the expulsion or attempted expulsion of pickets or handbillers from private property constitutes an unfair labor practice would necessarily be based only on picketing or handbilling that the General Counsel deemed peaceful and protected. In issuing a complaint alleging interference with protected activity, the General Counsel has made the determination that unprotected activity, such as violent or mass picketing, is not present. Where the General Counsel finds unprotected activity, no complaint will issue, and state court jurisdiction to enjoin this unprotected activity will, of course, be unimpeded by any preemption of the Act. However, where a complaint alleging protected activity issues, the Board's statutory mandate to prevent unfair labor practices would properly prevail over the State's interest in protecting private property against a trespass.[55]

Based on the above discussion, we hold that the filing or active pursuit of a state court lawsuit seeking to enjoin protected peaceful picketing after the point of preemption–-when a complaint issues concerning the same activity–-tends to interfere with Section 7 rights thereby violating Section 8(a)(1) of the Act. Accordingly, if there is a pending state court lawsuit when a complaint issues, the respondent has the burden to show that it has taken affirmative action to stay the state court proceeding within 7 days of the issuance of the complaint. If there is an outstanding injunction when a complaint issues, the respondent has the burden to show that it has taken affirmative action to have the injunction withdrawn within 7 days of the issuance of the complaint.[56]

complaint. In other words, the rule we announce here does not contemplate a regime in which state courts will invariably issue injunctions prior to the General Counsel's decision on related unfair labor practices charges.

[51] See *Sears*, supra at 206–207 fn. 43; *Garmon*, supra at 245; *Brown v. Hotel & Restaurant Employees Local 54*, supra, 468 U.S. at 502–503. Any decision by the Board in the unfair labor practice proceeding will also necessarily prevail over a conflicting decision by a state tribunal. See fn. 43, supra.

[52] *Longshoremen ILA v. Davis*, supra, 476 U.S. at 393. Most state courts, including the courts of the State in which the present proceeding arose, are well aware that they lack power to proceed in matters preempted under *Garmon*. See, e.g., *Riesbeck Food Markets v. Food & Commercial Workers Local 23*, 404 S.E.2d 404, 406–411 (W.Va. 1991); *Cross County Inn v. Carpenters*, 50 Ohio App.3d 8, 552 N.E.2d 232, 236 (Ct. App. 1989). Indeed, many have acceded to preemption of their jurisdiction as of the filing of an unfair labor practice charge. *Riesbeck*, supra, 404 S.E.2d at 410, and cases there cited. It can hardly be said, therefore, that we manifest any insensitivity to rights under state trespass laws through our holding that it is an unfair labor practice to pursue postcomplaint litigation aimed at ejecting from property persons who are subsequently determined to have a federally protected right to be there.

[53] *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946).

[54] *Clyde Taylor* established the general principle that the filing of a lawsuit is not in and of itself an unfair labor practice. In later cases, the Board carved out exceptions to that general rule. See generally *Power Systems*, 239 NLRB 445, 449–450 (1978), enf. denied on other grounds 601 F.2d 936 (7th Cir. 1979). However, to date the Board has not expressly held that seeking to enjoin peaceful picketing is unlawful. To the extent that it is inconsistent, we overrule Clyde Taylor.

[55] Should peaceful picketing become violent or disruptive, the activity would lose its protected status under well-settled precedent, e.g., *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957), and the State's strong local interest in protecting the safety of its citizens would prevail.

[56] When the General Counsel issues a complaint alleging that a respondent is violating Sec. 8(a)(1) by unlawfully interfering with union picketing or handbilling on its premises and if the General Counsel is aware of a pending state court proceeding in which the same matter is being litigated, we believe it would be beneficial for him to issue simultaneously a notice to that court and to the respondent. A suggested format of this notice is attached as ''Appen-

*Continued*

On March 30, 1989, the General Counsel issued the instant complaint alleging that the Respondent violated Section 8(a)(1) by interfering with the Union's peaceful protected activity of picketing and handbilling. The Respondents did not they seek to have the injunction withdrawn.[57] We, therefore, find that the Respondents also violated Section 8(a)(1) by their pursuit of their lawsuit seeking to enjoin the Union's peaceful picketing and handbilling after the complaint in this proceeding issued on March 30, 1989.

### D. *Application of Our Holdings to the Present Case*

Application of an arguably new rule to the parties in the case in which it is announced (and to parties in other cases pending at that time) is permissible so long as this does not work a ''manifest injustice.'' See, e.g., *NLRB v. Bufco Corp*., 899 F.2d 608, 609 (7th Cir. 1990), and cases there cited. We see no injustice to any of the parties here in retroactive application of our rulings because the current state of the law governing lawsuits against trespassers exercising Section 7 rights can fairly be described as unsettled.

Certainly, the law was clear between 1960 and 1978, when, as explained in section C, above, *Clyde Taylor Co*., supra, was a governing precedent that precluded the Board from finding that the maintenance of a lawsuit seeking to obtain an injunction against Section 7 activity was an unfair labor practice. In 1978, in *Power Systems*, supra, the Board carved out a large exception to *Clyde Taylor*, but purported not to overrule it. The Supreme Court in *Bill Johnson's*, supra, 461 U.S. at 739, nonetheless expressed the view that *Power Systems* had provided a purely ''illusory'' basis for distinguishing *Clyde Taylor* and had, in effect, overruled it. Further uncertainty about the status of state court lawsuits vis-a-vis Board proceedings was introduced by the *Sears* dicta, discussed above.[58]

Under all the circumstances, we cannot conclude that, at the time the conduct at issue in this case occurred, union charging parties had settled expectations that state court lawsuits to enjoin protected trespassory activities would be found to be unfair labor practices from their inception and would call for make-whole remedies extending throughout the pendency of the suit. Neither can we conclude that employer/property owners have settled expectations that they could prosecute such lawsuits with impunity. There is, therefore, nothing manifestly unjust in applying to the parties rulings which, for the reasons set out at length in this opinion, accomplish the purposes of our statute with due accommodation for landowners' rights of access to state legal forums.

## CONCLUSION OF LAW

By demanding that the Union refrain from area standards picketing and handbilling protected by Section 7 of the Act near the entrances and exits to Makro's store, and by their pursuit of their state court lawsuit, which sought to enjoin this peaceful protected activity, after the General Counsel on March 30, 1989, issued a complaint, the Respondents have violated Section 8(a)(1) of the Act.

## REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist including ceasing and desisting from prosecuting its state court lawsuit and from giving effect to the state court injunction limiting the Union's access to the Respondents' property for picketing.[59]

We shall further order the Respondents to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondents to seek to have the injunction obtained against the Union's picketing and handbilling withdrawn. In addition, in order to place the Union in the position it would have been in absent the Respondents' unlawful conduct, we shall order them to make the Union whole for all legal expenses, plus interest as computed in *New Horizons for the Retarded*,[60] incurred in the defense of the Respondents' lawsuit, in-

dix C.'' The notice will state that the Board is asserting jurisdiction over the picketing or handbilling at issue, that state court jurisdiction is preempted until such time as the Board holds the picketing or handbilling to be unprotected, and that the state court action should be held in abeyance pending the Board's decision. The notice will also inform the respondent that it may not actively pursue the lawsuit and that it has 7 days to seek a stay of the state court proceedings. If there is an outstanding injunction, the respondent has 7 days to seek to have it withdrawn. Further, the respondent will be informed that it runs that risk of violating Sec. 8(a)(1) if it does not heed these instructions. This notice is intended as a courtesy only and the failure of a respondent to receive one will not constitute a defense to an unfair labor practice allegation.

[57] The Court of Common Pleas, Lake County, Ohio, entered a permanent injunction on September 16, 1988, prior to the issuance of the complaint in this proceeding. The Union appealed this decision to the Court of Appeals, Eleventh District, Lake County, Ohio, and on December 26, 1989, the court of appeals affirmed the judgment of the trial court.

[58] As noted in fn. 34, supra, *Giant Food Stores*, 295 NLRB 330 (1989), provided no reliable basis for assessing the Board's view of the application of *Bill Johnson's* to preempted lawsuits. The Board's order denying motions for reconsideration in that case stated that the parties had not previously made arguments based on the footnote in *Bill Johnson's* referring to preempted lawsuits, and the Board was, therefore, declining to consider the ''legal sufficiency'' of those arguments because they were untimely raised. *Giant Food Stores*, 298 NLRB 435 fn. 4 (1990).

[59] Because we have concluded that the Union's picketing was protected activity, as noted above, the Board's decision supersedes that of the state court. See Garmon, supra at 245 (''[i]f the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or § 8, then the matter is at an end, and the States are ousted of all jurisdiction''); and *Sears*, supra at 206–207, fn. 43.

[60] 283 NLRB 1173 (1987). See also *Summitville Tiles*, 300 NLRB 64 (1990).

cluding appeals, after the March 30, 1989 issuance of the complaint in this proceeding.

## ORDER

The National Labor Relations Board orders that Respondent Makro, Inc., Willoughby, Ohio, its officers, agents, successors, and assigns, and Respondent Renaissance Properties Co., d/b/a Loehmann's Plaza, Beachwood, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Demanding that representatives of United Food and Commercial Workers Union Local No. 880, AFL–CIO–CLC stop engaging in peaceful area standards picketing and handbilling protected by the Act in front of the entrances and exits of the Makro store in Loehmann's Plaza Shopping Center, Willoughby, Ohio.

(b) Prosecuting its state court lawsuit styled as Makro, Inc., Loehmann's Plaza v. United Food & Commercial Workers Union Local 880, Case No. 88–L–13–190 (Court of Appeals, Eleventh District, Lake County, Ohio), giving effect to the permanent injunction granted by the Court of Common Pleas, Lake County, Ohio, on September 16, 1988, as affirmed by the Ohio Court of Appeals on December 26, 1989, or, after any complaint issues alleging interference with peaceful protected picketing or handbilling, filing or maintaining a lawsuit seeking to enjoin such protected activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Seek to have the permanent injunction, described above, obtained against the Union's peaceful picketing and handbilling withdrawn.

(b) Reimburse the Union for all legal expenses, as provided in the remedy section of this decision, it has incurred after the March 30, 1989 issuance of the complaint in the instant proceeding in the defense of the Respondents' lawsuit to enjoin the Union's peaceful picketing and handbilling.

(c) Post at the Makro store in Loehmann's Plaza Shopping Center copies of the attached notices marked ''Appendix A'' and ''Appendix B.''[61] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by each Respondent's authorized representative, shall be posted by each Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by each Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges unfair labor practices not found herein.

MEMBER DEVANEY, concurring in part, dissenting in part.

I agree with my colleagues that the Respondents violated Section 8(a)(1) of the Act by demanding that the Union remove its picketers from the area near the entrances to Makro's store. I further agree that, because the Respondents did not file or pursue their state court trespass lawsuit against the Union for a retaliatory motive, the lawsuit prior to the General Counsel's issuance of the complaint against the Respondents did not violate Section 8(a)(1). Contrary to my colleagues, however, I would find that, absent retaliatory motive and given a reasonable basis for filing the suit, the Respondents did not violate Section 8(a)(1) in maintaining the lawsuit even after the General Counsel issued his complaint.

The right of parties to file lawsuits is a paramount constitutional value which has been emphasized regularly by the Supreme Court[1] Because of the importance the American system of justice places on the rights of parties to seek vindication of their legal claims in court, a lawsuit should not, in my view, be held to violate Section 8(a)(1) of the Act because it potentially interferes with Section 7 rights. Rather, the Board must balance competing policy interests. Before finding that a lawsuit violates Section 8(a)(1), the Board should examine whether the lawsuit was filed or maintained for a retaliatory purpose and whether it had a reasonable basis. The Supreme Court in Bill Johnson's Restaurants,[2] required application of these criteria to lawsuits other than ones that are preempted or have an illegal objective. I would similarly apply these criteria to lawsuits, like that filed by the Respondents, that are potentially preempted by the General Counsel's issuance of a complaint.[3]

[61] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). See generally *In re Primus*, 436 U.S. 412 (1978).

[2] *Bill Johnson's Restaurants*, supra.

[3] There is a strong argument for holding that a trespass lawsuit such as that of the Respondents should not be preempted unless and until the Board issues a decision finding exclusion of the picketers or handbillers to violate the Act. See *Riesbeck Food Markets v. Food & Commercial Workers Local 23*, 404 S.E.2d 404, 412–415 (W.Va.

*Continued*

The policy reasons for affording special protection to a party's adjudicatory rights do not end when the General Counsel issues a complaint alleging that the conduct that is the subject of the suit is protected by the Act. Although the General Counsel has a right to pursue before the Board his claim that a party's conduct constitutes an unfair labor practice, the party also has a right to pursue before a state court its claim that its rights granted by state law have been violated. In my view, the General Counsel's issuance of a complaint does not bar pursuance of a reasonably based, nonretaliatory lawsuit. Although the General Counsel ultimately may prove that the party violated the Act, it is also possible that the General Counsel's complaint will be dismissed and the party's state court claim will be found meritorious.

Attempts to vindicate legal claims in different forums are a hallmark of our judicial system and a party's constitutional right to seek vindication of its legal claims in court should continue to receive the same protection that was afforded it before the General Counsel's complaint issued.

In this case, the Respondents' filing and pursuit of their trespass lawsuit against the Union, both before and after the General Counsel issued a complaint against the Respondents for demanding the picketers' removal from the Respondents' property, were not retaliatory. The Respondents' trespass lawsuit against the Union sought injunctive relief. No compensatory or punitive damages were requested[4] Nor did the Respondents make any threats of reprisal against the picketers or the Union for engaging in the picketing[5] Thus, there is no evidence that the Respondents' motive for filing and pursuing their lawsuit was anything other than a desire to have their property right claims adjudicated under state law. In these circumstances, there is no showing that the Respondents' motive for filing or pursuing their lawsuit was to retaliate against the Union's and picketers' exercise of Section 7 rights.

I also believe that Respondents' filing and pursuit of their trespass lawsuit had a reasonable basis. The picketers were on the Respondents' property and refused the Respondents' request to depart. Additionally, whether the picketers possessed a privilege under the Act to be present on the Respondents' property was less than certain. As the Board emphasized in Jean Country, ''In the final analysis . . . there is no simple formula that will immediately determine the result in every [access] case.''[6]

Because the record does not prove that Respondents' lawsuit was filed for a retaliatory reason or lacked a reasonable basis, I dissent from my colleagues' conclusion that the Respondents' pursuit of their lawsuit after issuance of the General Counsel's complaint violated Section 8(a)(1) of the Act. In my view, the Supreme Court has told the Board that it needs to grant ample leeway to parties who seek to simultaneously vindicate their legal claims in courts of law and before this Board.

S.Ct. 1991) (Justice Neely, dissenting). Among the most compelling reasons for such a holding is the fact that, if the Board ultimately finds the employer's efforts to exclude picketers or handbillers do not violate the Act, the Board is unable to offer the employer any remedy. The employer may obtain relief only from the state court, as trespass itself does not violate the Act. See *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 212–214 (1978) (Justice Powell, concurring). One of the underlying rationales of the dissenting opinion in Riesbeck was criticism of the Board's ''glacial'' pace of decisionmaking. This critique is yesterday's news and is no longer accurate. The current Board, appointed by President Bush, has reduced the pending caseload at the NLRB so that statistically the Board today is in the best case decision position it has been in since 1970. The Board intends to do even better. We expect to have no case pending in Washington for more than 1 year by the early part of calendar year 1992. On an interim basis, I believe that it is appropriate to begin to limit the jurisdictional ''no man's land'' that currently exists. Therefore, I join my colleagues' conclusion that preemption occurs when the General Counsel, acting in his capacity as the Presidentially-appointed, Senate-confirmed prosecutor of the statute, issues a complaint against an employer based on his independent investigation.

[4] Cf. *H. W. Barss Co.*, 296 NLRB 1286 (1989) (lawsuit seeking large damage amount found to have retaliatory motive); *Phoenix Newspapers*, 294 NLRB 47 (1989) (lawsuit seeking large punitive damage amount found to have retaliatory motive); *American Pacific Concrete Pipe Co.*, 292 NLRB 1261 (1989) (same).

[5] Cf. *Bill Johnson's Restaurants*, 290 NLRB 29 (1988) (retaliatory motive for lawsuit found where employer made threats of reprisal).

[6] 291 NLRB 11, 14 (1988).

## APPENDIX A

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT demand that representatives of United Food and Commercial Workers Union Local No. 880, AFL–CIO–CLC stop engaging in peaceful area standards picketing and handbilling protected by the Act in front of the entrances and exits of the Makro store in Loehmann's Plaza Shopping Center, Willoughby, Ohio.

WE WILL NOT prosecute our state court lawsuit styled as *Makro, Inc., Loehmann's Plaza v. United Food & Commercial Workers Union Local 880*, Case No. 88–L–13–190 (Court of Appeals, Eleventh District, Lake County, Ohio), give effect to the permanent injunction granted by the Court of Common Pleas, Lake County, Ohio, on September 16, 1988, as affirmed by the Ohio Court of Appeals on December 26, 1989, or, after any complaint issues alleging interference with peaceful protected picketing or handbilling, file or maintain a lawsuit which seeks to enjoin such protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL seek to have the permanent injunction against the Union's peaceful picketing and handbilling, as granted by the Court of Common Pleas, Lake County, Ohio, and affirmed by the Ohio Court of Appeals, withdrawn.

WE WILL reimburse the Union for all legal expenses incurred after the March 30, 1989 issuance of the complaint in the instant proceeding in the defense of our lawsuit to enjoin the Union's peaceful picketing, including the appeals, plus interest.

MAKRO, INC.

## APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT demand that representatives of United Food and Commercial Workers Union Local No. 880, AFL–CIO–CLC stop engaging in peaceful area standards picketing protected by the Act in front of the entrances and exits of the Makro store in Loehmann's Plaza Shopping Center, Willoughby, Ohio.

WE WILL NOT prosecute our state court lawsuit styled as *Makro, Inc., Loehmann's PLaza v. United Food & Commercial Workers Union Local 880*, Case No. 88–L–13–190 (Court of Appeals, Eleventh District, Lake County, Ohio), give effect to the permanent injunction granted by the Court of Common Pleas, Lake County, Ohio, on September 16, 1988, as affirmed by the Ohio Court of Appeals on December 26, 1989, or, after any complaint issues alleging interference with peaceful protected picketing or handbilling, file or maintain a lawsuit seeking to enjoin such protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL seek to have the permanent injunction against the Union's peaceful picketing and handbilling, as granted by the Court of Common Pleas, Lake County, Ohio, and affirmed by the Ohio Court of Appeals, withdrawn.

WE WILL reimburse the Union for all legal expenses incurred after the March 30, 1989 issuance of the complaint in the instant proceeding in the defense of our lawsuit to enjoin the Union's peaceful picketing, including the appeals, plus interest.

RENAISSANCE PROPERTIES CO., D/B/A
LOEHMANN'S PLAZA

## APPENDIX C

[Addressed to Clerk of Court]
[State Court Case Name and Number]
[Board Case Name and Number]
Dear_____:

I am writing to you as Regional Director of the National Labor Relations Board (Board). On [date], I issued an unfair labor practice complaint in [Case Name and No.] alleging that the [Name of Respondent] is violating Section 8(a)(1) of the National Labor Relations Act by unlawfully interfering with union picketing or handbilling on its premises.

As a result of the issuance of the complaint, state court jurisdiction is preempted until such time as the Board holds the picketing or handbilling to be unprotected under the Act. See *Loehmann's Plaza*, 305 NLRB No. 81 (Nov. 21, 1991). Accordingly, the state court action should be held in abeyance pending the Board's decision.

A copy of this letter is being sent to [Name of Respondent/Plantiff] in the state court matter. This party may not actively pursue the state court lawsuit and has seven (7) days to seek a stay of the state court proceeding. If there is an outstanding injunction, this party has seven (7) days to seek to have it withdrawn. If [Name of the Respondent/Plantiff] fails to heed these instructions, it may be subject to additional liability under Section 8(a)(1) of the Act.

Sincerely,
Regional Director

cc: Plantiff and Defendant in the state court proceeding and their counsel
Parties to the Board proceeding and their counsel

*Paul C. Lund, Esq.*, for the General Counsel.
*Thomas R. Fredericks, Esq.*, of Covina, California, and *Christopher Kroll, Esq.*, of Troy, Michigan, for the Respondents.
*Patricia Braizel*, of Cleveland, Ohio, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The charge filed by the United Food and Commercial Workers Union, Local No. 880, AFL–CIO–CLC (the Union), on June 21, 1988, was served by certified mail on Makro, Inc. and Renaissance Properties Co., d/b/a Loehmann's Plaza (the Respondents) on June 23, 1988. An amended charge filed on June 28, 1988, was served by certified mail on the Respondents on June 29, 1988.

A complaint and notice of hearing was issued on March 30, 1989. The complaint alleged that the Respondents interfered with the efforts of the Union to lawfully picket and handbill at Loehmann's Plaza in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

The Respondents filed timely answers denying that they had engaged in the unfair labor practices alleged.

The case came on for hearing in Cleveland, Ohio, on July 11 and 12, 1989. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

### I. THE BUSINESS OF THE RESPONDENTS

Respondent Makro is an Ohio corporation that operates retail stores in Ohio, Maryland, and Pennsylvania, including a facility located in Loehmann's Plaza Shopping Center, 27853 Chardon Road, Willoughby Hills, Ohio, the only location involved in this proceeding, where it is engaged in the retail sale of goods. Annually, in the course and conduct of its operations described above, it receives gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Ohio.

At all times material herein, Respondent Renaissance is an Ohio general partnership, which owns, operates, and rents various properties including Loehmann's Plaza, with its principal office located at Suite 330, Three Commerce Park Square, 23200 Chargrin Boulevard, Beachwood, Ohio. Annually, in the course of its business operations described above, Respondent Renaissance derives gross revenues in excess of $100,000, of which in excess of $25,000 is derived from Respondent Makro, whose operations are described above.

Respondent Makro is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent Renaissance is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

#### A. *Facts*

First: On May 4, 1988, Respondent Makro engaged in a ribbon-cutting ceremony at its new supermarket located in the northeast corner of Loehmann's Plaza in Willoughby Hills, Ohio. It was in the process of opening its membership retail supermarket for customers. Prior to the ceremony the Union appeared at 7 a.m., positioning two pickets at the nonfood exit, two at the food exit, and two at the entrance of the store.[1] All pickets were on property controlled by the Respondents. People were already commencing to gather for the ribbon-cutting ceremony. Patricia I. Braizel, a union organizer, and Jison Ponting, a union business agent, were present.

Pickets walking ''seven or eight feet'' from the entrance and exit doors, carried Signs described by Braizel as follows:

> The picket signs are red, white and blue in color, and on the top it says, ''UFCW Local 880,'' and then it says, ''Holding the line.''
>
> And then it says ''Don't shop.'' In the middle it's got like a ''Ghostbuster'' symbol with a Makro, and then it's got ''Non- union,'' and below that it says, ''For the American standard of living.''

General Manager Fike and Attorney Lardakis emerged from the store. Lardakis told the union representatives that ''he wanted [them] to remove [themselves] from the premises''; that it was private property. Ponting refused. Shortly thereafter Willoughby Hills police officers arrived. Ponting informed the police officers that the Union was ''informationally picketing.'' After a conference with Fike and Lardakis, the police asked the pickets ''if [they] would move.'' Ponting answered, ''No,'' whereupon the police asked if the pickets would remove themselves from the doorway areas during the ribbon-cutting ceremony. The Union acquiesced but returned to the entrance and exits as soon as the ceremony was completed. The pickets continued to picket and handbill at Makro's entrance and exits on Makro property, between the vestibules, until they were restrained by a temporary order of the Court of Common Pleas, Lake County, Ohio, on June 29, 1988. Thereafter on September 16, 1988, the court entered a permanent injunction restraining the Union ''from placing more than four (4) pickets on picket duty in front of the plaintiff store, and no more than two (2) at the entrance to the parking lot at Route 6 [and] that the pickets shall station themselves in the parking lot south of the front of the store, and may not approach closer to the

[1] Makro had been advised in writing by the Union that it intended to establish a picket line and distribute handbills to Makro customers.

front of the building than twenty-five (25) feet.'' The complaint for injunctive relief was filed by Makro and Loehmann's Plaza on June 6, 1988. Makro leases its space from Renaissance Properties Company, the owner of the plaza.

Second: The Makro storefront faces Loehmann's Plaza's primary parking lot. A vehicle driveway running parallel to the storefront separates the Makro property from the primary lot. This shopping center driveway is used by cars entering and leaving the parking lot and for customers who chose to pick up purchases at the Makro store.

The storefront has one customer entrance and two customer exits, one for food items and the other for nonfood items.[2] The exits are located on each side of the entrance. Each exit and entrance, which has double doors, is housed in a separate glass-enclosed vestibule area. The store frontage is about 500 feet long. Three rows of shopping carts are parked between the exits and the entrance.[3] The carts are stored there by ''cart associates'' whose main job is to collect the carts from the parking lots. The carts are lined about ''15 feet outward'' from the wall of the storefront and approximately 25 feet from the entrance door. The carts are located about 15 feet from the vehicle driveway. The front wall of the store is about 30 feet from the driveway leaving 15 feet of open space beyond the carts toward the driveway. This 15-foot open space is used by customers to ''pull their cars up to load their merchandise into their cars.'' There is no raised or curbed sidewalk in front of the Makro store.

Three painted crosswalks transgress the driveway corresponding to the store's exits and entrances. At the end of these crosswalks are painted traffic islands.

Third: Makro is located in the northeast corner of Loehmann's Plaza. Nineteen other smaller establishments occupy the space to the west situated in an L-shape. On the south side of the plaza, along Chardon Road (Route 6), are several other establishments, which are not a part of Loehmann's Plaza proper. A large parking lot, composed of primary and secondary parking areas, centers these establishments. An access driveway runs along the east side of the primary parking area and intersects with the driveway that runs in front of the Makro store and Chardon Road (Route 6).

There are three entrances to Loehmann's Plaza from Chardon Road (Route 6), which borders the south side of Loehmann's Plaza. The closest entrance is approximately one-fourth mile from the Makro store. Two of these entrances, toward the east and west, are equipped with traffic lights. Burger King and Friendly, located along Chardon Road and west of the east entrance, are reached by automobile through the east entrance to the Loehmann's Plaza parking lot. The speed on Chardon Road is 35 miles an hour.

Bishop Road (State Route 84) runs north and south and is parallel to the access drive that runs from Chardon Road along the parking lot to the Makro store. The speed limit on Bishop Road is 35 miles an hour. There is an entrance off Bishop Road from which a driveway leads directly to Makro and into the Loehmann's Plaza. This entrance is about 500 feet from the access driveway coming in from Chardon Road. Located along the driveway leading into Loehmann's Plaza from Bishop Road are two establishments, Reni and Hills. In the same vicinity are Baker's Square and Pettiti. There are two entrances and exits to the Reni's and Hills' areas.

> There is one that is next to the Loehmann's Plaza Makro entrance where you can come in and go either around Reni's and Hill's, or you can come in and take a left and go to the Pettiti's back then and around the front of Hill's and Reni's also.
>
> And then there's one at the east of Hill's and Reni's, but to the south of that first one. And that will take you around through the front of Hill's and Reni's.
>
> But you drive through a drive line and then it dumps you into the access road that takes you into Makro It takes you into the parking area of the primary and secondary parking areas.

A grassy berm runs along the access driveway and lines the primary parking area. Entrance and exit to this parking area is at the southeast corner near the east entrance at Chardon Road. In front of the Makro store and due south in the primary parking area are 8 driving lanes and 15 rows of cars. Raised islands and five painted hash-marked islands lie on the south side of the driveway that runs in front of the Makro store. These islands abut the parking spaces of the primary parking area. Toward the west, the driveway that passes in front of the Makro store runs into the secondary parking lot. The primary parking area occupies the space between the driveway in front of Makro store and Burger King on Chardon Road. Burger King and Friendly occupy the space between the center and east entrances on Chardon Road.

Fourth: As noted above, the Union commenced in the first instance to picket and handbill the exits and entrance to the Makro store. The handbilling and picketing were peaceful and informatory in character.

It is apparent that the State Common Pleas Court found that the site chosen by the Union for its otherwise lawful picketing and handbilling was not a permissible site because it moved the pickets and handbillers 25 feet away from the storefront. However, the 25-foot limit placed the pickets and the handbillers in the middle of the driveway running east and west along the front of the Makro store. The traffic on the driveway caused the Union to seek an alternate place to picket and handbill; it chose the grassy island, and hash-marked areas about 40 feet from the storefront and adjacent to the primary parking lot between the driveway and the parking lot. This area was chosen because it had ''some semblance of safety.'' The move to this adjacent area occurred on July 11, 1988.

In issuing the restraining order that moved the pickets 25 feet from the store entrance and exits, the state judge found:

> that Defendant, prior to June 29, 1988, trespassed on the Plaintiff's property with the intention of physically injuring and disrupting the Plaintiff's business. The Court also finds that the defendant would continue to do so if a permanent injunction were not granted.

[2] Respondents described Makro as being engaged in the business of ''operating a warehouse club selling food and non-food items.''

[3] Makro has two types of carts, ''the regular discount grocery store type cart, and then we have flat carts that are used for large volume purchases.''

> The Court finds that the Defendant has a lesser right to picket for informational purposes, but it cannot carry out its objectives by trampling on the Plaintiff's rights.

The Union had attempted to picket at all the entrances on Chardon Road. At the east entrance the Union placed pickets at the Burger King side of the driveway entrance. The manager of Burger King advised the Union that it did not have permission to picket, thus the Union moved the pickets across the driveway where there was posted a Golden Circle and Reni's sign. The manager of Reni advised the Union that his customers were complaining about the signs and inquired which Reni was being picketed. (Reni is organized by the Union.) The Union ceased picketing at this place. The picketing was not particularly effective here in any event for ''you cannot read the wording on the sign approaching either of those exits on that driveway or that State Route 6.''

The Union moved to the center of Chardon Road where it picketed and passed out handbills. Here ''no one . . . took a handbill.'' Later when the Union again picketed for its preparation for the state court injunction one person took a handbill. The difficulty in handbilling here was due to the speed of the automobiles, the fact that automobile windows were closed and the pickets were on the opposite side from the driver. Chardon is a ''very busy road.''

The entrance on the west is the ''least entered.'' These entrances afforded slight chance of personal contact between the pickets and customers or potential customers to whom the Union sought to convey that Makro was nonunion, that shopping at Makro places ''the jobs and livelihood of our union membership in jeopardy,'' and that the Union did not want persons to trade with Makro.

During the first 2 months in which handbills were passed out at the exits and entrance of the store, ''approximately 65,000 to 70,000 handbills'' were distributed. From July 1, 1988, the date handbilling was removed from the entrance and exits ''another 7,000 or 8,000 handbills'' were passed out. During the winter months the Union curtailed its handbilling because cold and inclement weather made handbilling difficult; handbills became wet from the snow and could not be easily handled with mittens and because of the cold, people did not delay in their paths to and from the store to take handbills.

According to Braizel, at the grassy areas ''You can't handbill because people are loading their cars; you can't handbill people that are walking from Makro to the Gentry/Revco area; you can't handbill people that walk along or within the 25 foot range.'' The communication, according to Braizel, with Makro's customers and potential customers, fell from around 90 percent to 75 about 15 percent. Almost all persons took handbills at the entrance and exits.

On July 12, 1988, Braizel's record disclosed that 384 customers passed at such a great distance from the handbillers that they were unable to give them a handbill and that 85 times handbillers would have been hit by an automobile if they had not moved. According to handbiller Rosemarie Marimpietri, one of about five persons took a handbill at the island. She testified that she passed out ''15 or 20'' handbills in an average 5-hour shift.

Handbiller Jean Bober described some of the difficulties she encountered while handbilling from the hash-marked areas: oncoming traffic, people who did not cross the 25-foot line, people loading in the driveway, people having a problem finding cars, and cold weather. About one out of every five persons coming out of Makro would come close enough to be confronted with a handbill. Said Bober, ''We're just at a location where it's hard to get to the people.'' However, she testified that, except for the exits and entrance, there is no better place to handbill.

Makro has prohibited all solicitation or distribution of literature on its premises by nonemployees. It has a no- solicitation sign posted on the doors of the entrance to the store. The parking areas are open to all persons.

### B. *Conclusion and Reasons Therefor*

The Respondents conceded ''The evidence here establishes that Makro and Renaissance at all times acted in conjunction with each other in responding to the trespassing activities of Local 880.'' The General Counsel does not contest that the Respondents had a property right in the areas utilized by the Union. I so find.

Both parties cite *Jean Country*, 291 NLRB 11 (1988). *Jean Country* teaches that under the credited facts of this case the Union possesses Section 7 rights and the Respondents enjoyed a property right in the premises. Which right predominates is a prime consideration in the case.

In the case of *Lechmere, Inc.*, 295 NLRB 92 (1989), the Board said:

> The Board in *Jean Country* found that the following factors may be relevant to assessing the weight of a property right: the use to which the property is put; the restrictions, if any, that are imposed on public access to the property; and the property's relative size and openness. The factors that may be relevant to the consideration of a Section 7 right include: the nature of the right; the identity of the employer to which the right is directly related (e.g., the employer with whom a union has a primary dispute); the relationship of the employer or other target to the property to which access is sought; the identity of the audience to which the communications concerning the Section 7 right are directed; and the manner in which the activity related to that right is carried out. Finally, factors that may be relevant to the assessment of alternative means include: the desirability of avoiding the enmeshment of neutrals in labor disputes; the safety of attempting communications at alternative public sites; the burden and expense of nontrespassory communication alternatives; and the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message.

The Respondents rely on *Tecumsah Foodland*, 294 NLRB 486 (1989), a comparable case to the instant case herein. In such case, ''five persons stood on the covered sidewalk by the entrance opening, as well as in the entrance area, and handed out handbills to customers entering and leaving the store. The handbills advised customers that this was a nonunion store that did not provide union wages and benefits, and appealed to them toshop at union stores.''

In the instant case according to Michelle Broda, employment manager, 12 pickets were stationed ''basically right outside the door[s]'' of the exits and entrance ''but they did wander into that area in front of the carts.'' According to

Broda's diagram, the pickets sometimes walked in a path somewhat like a circle in a space of about 24 feet by 29 feet. The pickets carried picket signs that informed Makro patrons that Makro was nonunion, don't shop. Later handbills were added elaborating on the same theme.

As in *Tecumsah Foodland*, Makro did not share its building with any other tenant. Also its pickup areas were under its exclusive control and used only by its customers . Patrons were required to be club members to enter Makro's store. As in *Tecumsah Foodland*, solicitations were banned.

As in *Tecumsah Foodland*, the audience that the Union sought to reach ''could not reasonably be reached by direct personal contract, telephone, or mail'' and ''due to the detailed nature of the Union's message . . . the information could not be fully contained on a picket sign.''

As found in the *Tecumsah Foodland* (294 NLRB 486) case, ''a proper balancing of the parties' rights here would permit the Union to distribute its handbills in some manner and at some place on the Respondent's property.''

As in the *Tecumsah Foodland* case the manner in which the Union sought to exercise its Section 7 right by congregating around 12 pickets and handbillers in a limited area near the entrance and exits of the store, where store carts were parked and customers made pickup of purchased items, impermissibly impaired Makro's private property rights. There was no credible evidence that the Respondent allowed anyone onto its property other than for the purpose of shopping at the store.

The following language from *Tecumsah Foodland*, supra, is apropos:

> We find, in agreement with the judge, that the Respondent was not required to surrender access to its property without limitation to nonemployees whose numbers and location would tend to impede the access of patrons to its store. The Respondent had maintained a substantial private property interest in its commercial establishment, and the Union could just as effectively have communicated its message to customers by locating one or two pickets to distribute handbills near the store's doors, or perhaps by having the handbills distributed at some other location on the property. Therefore, because we find that the manner in which the Union exercised its Section 7 right impermissibly interfered with the Respondent's private property right to have its store's entrance be free and uncongested, and because the Union could effectively communicate its message to the Respondent's customers in a less physically obtrusive way, we conclude that the Respondent did not violate Section 8(a)(1) of the Act by ordering the Union's pickets and handbillers to leave the areas near the store's entrance and in the middle of its driveways.

One picket at each exit and entrance would have been sufficient to have publicized the Union's message and would have caused no congestion or impairment of the Respondent's property rights.

Since the instant case, in essence, is indistinguishable from *Tecumsah Foodland*, I recommend a dismissal of the complaint.[4]

## CONCLUSION OF LAW

Respondent has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

[4] If this case had been a matter of first impression, I would have found for the General Counsel.